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IN THE

UNITED STATES SUPREME COURT

No. _____

OCTOBER TERM 1981

STATE OF MINNESOTA,

Petitioner,

v.

JOHN HENRY BROWN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the rule in Edwards v. Arizona, U.S , 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should be applied retroactively to suppress a statement made to police officers after the suspect had clearly and unequivocally waived the right to the presence of counsel he had asserted the day before.

State Court Held: In the Affirmative.

2. Whether Edwards should be construed to permit questioning of one who earlier has asked for an attorney's presence where the strict waiver requirements of Johnson v. Zerbst, 304 U.S 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461

(1938) relating to voluntary relinquishment of a known right are, the next day, fully satisfed.

State Court Held: In the Negative.

3. Whether an accused's inculpatory statement which was volunteered, not in response to custodial interrogation, but after the statements of the victim and her mother were read to him by a police officer, may be received in evidence notwithstanding the fact he had the day before asked to see an attorney?

State Court Did Not Rule

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OPINIONS BELOW

State v. Brown, 313 N.W.2d 207 (Minn. 1981) remanded by the matter for consideration in the District Court, State of Minnesota.

State v.Brown, Order, Sidney P. Abramson, J., District Court, State of Minnesota, Second Judicial District, January 25, 1982, Appended, (suppressing evidence).

State v. Brown, 317 N.W.2d 714 (Minn. 1982) affirming order of suppression.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

Judgment of the Supreme Court of the State of Minnesota suppressing evidence in the nature of confessions of the accused under the Fifth and Fourteenth Amendments to the Constitution of the United States and remanding the cause to the District Court of the State of Minnesota for a new trial, entered on April 20, 1982.

Jurisdiction in this Court is invoked under 28 U.S.C. §1257(3).

Constitutional provisions involved:

AMENDMENT V.

Capital crimes; double jeopardy; self incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, §1.

§1. Citzenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACT

On March 23, 1980 Jeffrey and Christine Krier lived at 226 Charles Avenue in the City of St. Paul with their four children, Jennifer, aged 3 1/2, James, aged 1 1/2, and recently born twin daughters, Catherine and Elizabeth. (T.T. 84) Appellant John Henry Brown lived in a duplex at the end of their block on Charles; as the husband of Christine's ex-boyfriend's sister and a friend of Jeffrey's brother-in-law, Mike Gaske, he often visited the Krier home in the evening - as much as every other night. (T.T. 85-86, 101-102)

Appellant Brown came over during the day on the 23rd to ask the Kriers' permission for Jennifer to come over to help him fix

his doorbell; he lived in the upper unit of the duplex and said that she would be helpful in standing at the door and ringing the bell at his request as he worked on it. (T.T. 87, 102) Brown agreed to bring her back soon, as supper (the noon meal apparently) was almost ready. (T.T. 87) Fifteen or twenty minutes later, he called to ask if Jennifer could have soda pop and Christine agreed - if he also promptly got her home. (T.T. 88) Jennifer returned in fifteen minutes, kind of nervous and fidgeting - not her usual demeanor. (T.T. 88-89)

Actually, appellant was using the story about Jennifer helping him fix the doorbell as a pretext to get her to his residence alone. (T.T. 60-61) He took Jennifer into his bedroom, laid her on

his bed, removed her elastic pants and underpants, cleaned her vaginal and buttocks area with a wash cloth, and then licked both the areas of her vagina and buttocks with his tongue. He then told Jennifer to put his penis into her mouth and to suck on it and she complied. (T.T. 38-39, 60-61, 76-77, 89-90, 103-104) Before taking her home, he gave her a bottle of soda pop and a quarter (25¢) "for sucking his peter", telling her to tell no one what had happened. (T.T. 38-39, 61-62, 90-91)

Appellant agreed he had done the same things three of four days later to Jennifer at her apartment. (T.T. 61)

In fact, Jennifer did promptly tell her mother Christine what appellant had done. (T.T. 89, 94) Jennifer was able to communicate with her mother both

by naming and pointing to the parts of her body he had touched and licked; she knew the name of the part of his body he had asked her to suck. (T.T. 77, 89-90)

Jennifer wanted the police to be called right away but her parents delayed, Christine because she didn't want her daughter to "get involved" and Jeffrey because he wanted to confront appellant directly first - an intention he actually never managed to carry out. (T.T. 91, 104, 105, 107) Neither parent doubted that Jennifer was telling the truth. (T.T. 104) Actually, all that was done right away was that Christine put the quarter in Jennifer's piggy bank for her. (T.T. 91)

One to three weeks later, Christine Krier reported to police not only the acts appellant had committed

with Jennifer, but that he had been stealing property from his employer, St. Paul-Ramsey Hospital. (T.T. 92, 96-97) Christine and appellant Brown had been having a sexual relationship with each other over the years they knew each other, and she turned him in because he was bothering her with telephone calls and unwanted visits. (T.T. 92, 94, 109)

Police came immediately and arrested appellant Brown when he walked into the Krier home after work at about 4:30 p.m., carrying a bag full of medical supplies and equipment that the Kriers indicated, and Brown freely admitted, he had stolen at work. (T.T. 39-40, 45-46, 50-51)

Jennifer Krier on that day, March 27, 1980, [1] again told one of the arresting officers, Robert Bradish, what appellant had done to her in the same terms she had used to tell her mother. (T.T. 36-39) She repeated it to Sergeant Carolen Bailey of the Crimes Against Persons Unit on March 31, assuring the Sergeant that she understood the terms she was using and the acts she was describing. (T.T. 75-77)

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[1]Since police were called on March 27, 1980, without doubt, the Kriers must have been mistaken earlier when they said the crime took place on March 23 or when they said it took place over a week before appellant's arrest.

On the way to police station after appellant's arrest, Officer Bradish - who had encountered appellant before - said to him: "Well, you really got yourself into a mess this time, John Henry." (T.T. 42) After pointing out that he might be killed if he were sent back to prison, Brown asked who the "supposed" victim of his criminal sexual conduct was and Bradish told him: The Krier child. Appellant just chuckled. (T.T. 42-43) (The fact appellant asked who he was charged with molesting wouldn't point to his innocence, given the fact he admitted, as a part of his pre-sentence evaluation, to "a long history of attaction to and being sexual with children dating back to his early youth", and that among "his many child vicitms,... he very hesitantly admitted

to being sexual with his own children.)

STATEMENT OF THE CASE

Immediately after arresting appellant in the Krier kitchen on March 27, 1980 at 4:30 p.m., for theft and criminal sexual conduct, Officer Rhio Beckman handcuffed him and from memory gave him his four Miranda rights (T.R. 7, 14) When Beckman requested appellant consent to a search of his apartment for other stolen goods, appellant said he didn't want to say anything until he saw a lawyer. (T.R. 7, 15) The interview immediately ended. Later, in the squad car, after Officer Bradish had told him the Kriers' little girl was the victim in the criminal sexual conduct charge, appellant again said he didn't want to talk anymore and that he wanted an attorney. (T.R. 16, 18) Bradish ended the interview immediately. (T.R. 16)

At no time to any officer did appellant say he was represented by an attorney or refer to any particular attorney he wanted to speak to. (T.R. 11, 17)

To both arresting officers, appellant appeared to be in possession of his faculties - able to comprehend and to communicate and not under the influence of anything. (T.R. 11-12, 19-20)

At about 8:00 p.m. that evening, the 27th, Sergeant Joseph Pelton, in charge of security at St. Paul-Ramsey Hospital, interviewed appellant in jail. After appellant was read his four Miranda rights from the standard police card, he acknowledged he understood his rights, and without mentioning a lawyer, agreed that he wished to talk with the Sergeant. (T.R. 22-24) After fully

answering all questions about his theft of property from the hospital, appellant, claiming no more hospital property was at his home, signed a consent to search which Pelton acted upon, finding and seizing blankets, a stethoscope, and other apparent hospital property. (T.R. 24-27) The idea to search was appellant's; if you don't believe me, go ahead and look, he said. (T.R. 24, 27)

Again, Sergeant Pelton believed appellant was in possession of his full faculties and had no trouble communicating with him. (T.R. 29)

The next morning, March 28, at about 9:00 a.m., Sergeant-Investigator Richard Ward of the Crimes Against Persons Division interviewed appellant, again informing him from memory of his

Miranda rights. "I informed Mr. Brown that he had a right to remain silent and that anything he told me can and will be used against him in a court of law; that at the time he did not have to talk to me; if he did not wish to without an attorney present. If he wished to have an attorney, I would stop the conversation and an attorney would be furnished him. If he could not acquire an attorney, one would be furnished him by the court." To this, appellant stated "that he understood his rights and that he wanted to talk to me about the case." (T.R. 32, ll. 11-18, 21-22)

Even after this, Sergeant Ward had appellant read out loud each of the four Miranda warnings on the St. Paul Police standard waiver form and initial each as he read it, acknowledging that he

understood it. (T.R. 33)

Brown appeared normal and rational and seemed to understand and to answer questions coherently and logically. (T.R. 32-33)

Appellant made no special requests of Sergeant Ward - other than to ask the sergeant to write his statement for him - and at no time mentioned an attorney in any way. (T.R. 33-34)

After eliciting the facts about appellant's thefts from St. Paul-Ramsey Hospital, Sergeant Ward asked appellant about the criminal sexual conduct charges. Appellant requested he read the charges the Krier girl and her mother had made against him, and when Ward did, appellant got a sorrowful look, started to cry a bit and said he needed help. After the Sergeant

complied with appellant's request to read the complaint a second time, appellants blurted out that it was all true, admitted that the details Jennifer Krier had reported to her mother were just what had happened. (T.R. 35-36)

Appellant said that he felt very bad - like an animal - and that he needed help "that's why he was telling me this." (T.R. 36)

Sergeant Ward wrote the statement on three pages, had appellant go over it, signing each of the three pages to acknowledge they were correct. Appellant refused the copy of the written statement Ward offered him, saying Ward should keep it for him, he fearing adverse consequences if the statment fell into the hands of

another inmate while he was in jail. (T.R. 37)

The written Miranda waiver and signed statement were received at Rasmussen hearing, as State's Exhibit B. (T.R. 38)

Sergeant Ward had briefly reviewed Bradish and Beckman's report and wasn't aware of the reference to appellant's earlier request to see an attorney. (T.R. 39-40) Appellant had, of course, cooperated in aswering all of Sergeant Pelton's questions the night before. (T.R.24) Ward said he would have gone to appellant in any event and asked if he wanted to waive his rights; had appellant asked to see a lawyer on the morning of the 28th Ward would have immediately ended the

conversation. (T.R.40)

Only after all of the above events and occurred was appellant charged with criminal sexual conduct in the first and second degrees, and by separate complaint with two counts of felonious theft.

Appellant testified at the Rasmussen hearing and did not contradict the officers' testimony materially, other than to claim that he first admitted to Sergeant Ward he had invited Jennifer Krier into his home but denied molesting her, at which time he claimed Ward talked of "getting the sexual deal dropped." He did agree that he ultimately admitted the charges but only when asked for the third time; depressed and crying he broke down under the

emotional pressure. (T.R. 50-52)

The Rasmussen hearing was held on May 12, 1980 before the Honorable Harold W. Schultz, who found on the above evidence that the State had satisfied its heavy burden of demonstrating the free and voluntary nature of appellant's waiver of his right to an attorney's presence during custodial questioning.

Judge Schultz concluded:

"I think the essence of this matter involves, of course, the statement taken by Officer Ward. And there I was happy that you, Mr. Hanzel, (defense counsel) raised some questions as to the normal procedure that might have been used by the police department where it was brought to their attention that somebody had asked to see a lawyer. Because that question existed in my mind, too, what is the normal

procedure.

Well, I thought that the officer very candidly indicated that if he was aware of that that he would still go in and ask whoever the particular defendant may be whether he wants to see a lawyer. I didn't get the impression that Officer Ward indicated any desire on his part to try to change anybody's mind. I thought it was a recognition, very obviously, of the fact that very often people do change their minds.

This is not, by any stretch of the imagination, the first case that I have heard about or experienced where somebody changes their mind, even a matter of hours, let alone a matter of a day, where at first blush they say, no, they weren't going to say anything, weren't going to make a statement, but later they stated that they are.

I think the whole essence of the problem is, is there an obligation on the police department somewhere along the line when somebody requests a lawyer to say from that moment on we will never do a single thing with you until you have had the opportunity to see a lawyer. If that's not the law, then I think

the police department, considering the circumstances of a particular case; have a right in a sense to say, do you want to sign this form indicating that you refuse to make a statment or that you want a lawyer or for any number of things that they might want to do.

So, under the circumstances, with Officer Ward primarily being interested in the presentation of this case to the County Attorney's office that had to do with a theft, and when Mr. Brown did not reiterate or take the position that he wanted a lawyer, I think he did what was perfectly normal and is to be expected. He asked him some questions.

Now, it's a little vague as to exactly how they slid into the matter of the criminal sexual conduct information. Nevertheless, slide into it they did. This was voluntary sliding on the part of Mr. Brown, in my judgment, because he indicated with his initials that he understood his rights. He indicated by his signature on both page 1 and 2 before any comment was made, and by then his signature on page 3 when they did get into the matter that he seemed to be speaking without any reservation.

He certainly does have a right to change his mind. What might have looked on one day as some sort of a problem may have been diminished in his eyes as a problem. Human nature being what it is, Mr. Brown, who apparently has had some experience with the police and with lawyers, in my judgment waived his right to an attorney and made his statement voluntary.

I have read the Crisler case and I have made it a practice to read every other case that comes down, and in my judgment I do not know of another experience or case that I have had that leads me to believe that it's my judgment and my conclusion that your motion should be granted. Accordingly, your motion is denied. The matters covered in the statement will be admitted." (T.R. 67-70)

On May 13, 1980, the defense moved to have appellant examined under Rules Crim. Proc., Rule 20. He was found competent to stand trial and legally sane at the time the crime was committed. On

August 5, 1980, the defense asked the Honorable J. Jerome Plunkett to overrule Judge Schultz's Rasmussen order on grounds new psychological findings that appellant was pedophiliac and had a personality disorder dictated a contrary result. Judge Plunkett decided the prior order was valid on its face and referred it back to Judge Schultz for reconsideration. (T.T. 3-6)

Since Judge Schultz was on special term the matter was reassigned to the Honorable Sidney P. Abramson for trial. Judge Abramson elicited from Judge Schultz the latter's opinion that the psychological findings constituted no reason

for changing his decision. (T.T. 6-7)

Judge Abramson independently and after hearing argument of counsel and reviewing the psychological report and all the relevant cases, found again that the State had satisfied the heavy burden of demonstrating the voluntariness of appellant's waiver. (Argument: T.T. 8-19; Court's reasoning and recitation of authority; T.T. 19-26; Court's decision: T.T. 26)

Appellant thereupon waived his right to jury trial. (T.T. 26-29).

After trial Judge Abramson found him guilty as charged - criminal sexual conduct in the

first and second degrees - and sentenced him, after pre-sentence evaluation at the St. Peter Security Hospital and after denial of his post-trial motion for judgment of acquittal, to a term of zero to twenty years.

Appellant Brown noticed his appeal from the conviction to the Supreme Court of Minnesota, and thereafter this Court handed down its decision in Edwards v. Arizona, ___ U.S ___, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)

The Minnesota Supreme Court remanded the matter for reconsideration in light of Edwards (313 N.W.2d at 207) and the District Court, reversed its prior position and suppressed

Brown's statements and ordered a new trial believing that the holding in Edwards compelled the result. The Minnesota Supreme Court affirmed on grounds Edwards v. Arizona, 101 S.Ct. 1880 (1911) requires new trial of defendant on charges of criminal sexual conduct." State v. Brown, ___ N.W.2d ___ (Minn. no. 82-144, filed April 6, 1982)

The State of Minnesota's position in seeking certiorari is three-folded:

1. The rule in Edwards, if defined as creating a per se rule that there can be no waiver of one's right to counsel after at any such time asking to see an attorney save by initiation of

the encounter by the accused, consititutes radical and unforeseable departure from earlier waiver cases and should not be applied retroactively.

2. The rule in Edwards should be construed, as did Mr. Justice Powell in his concurring opinion (101 S.Ct. at 1887-1880, to require the knowing and intelligent waiver of Johnson v. Zerbst, 304 U.S 458, 464 (58 S.Ct. 1019), 1023, 82 L.Ed. 1461 (1938) which was until now the severest test of waiver known in this Court's decisions.

3. That these statements are, in any event, the product not of custodial interrogation but of the accused's internal need to

confess after hearing the victim's statement read twice, and therefore admissible under Rhode Island v. Innis, 446 U.S 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

ARGUMENT

THE STATE SATISFIED ITS HEAVY BURDEN OF DEMONSTRATING THAT APPELLANT'S DECISION TO TALK TO SERGEANT RICHARD WARD WITHOUT AN ATTORNEY PRESENT WAS FREELY AND VOLUNTARILY MADE.

The United States Supreme Court held in Miranda v. Arizona, 384 U.S 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966) that certain rights attended the custodial interrogation of a defendant which, if not honored, led to a violation of his privilege against compulsory self-incrimination under the Fifth and Fourteenth Amendments to the Constitution. Any statement taken in derogation of these procedures the Court held must be suppressed.

In summary, the Court speaking through Mr Chief Justice Warren held:

> [3-9] Our holding will be spelled out with some specificity in the pages which folow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, steming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedureal safeguards to be emplyed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous oportunity to exercise it, the following measures are required.

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicated in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be quested.

...

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statment after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have any opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before

speaking to police, they must respect his decision to remain silent.

[49-51] If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. State of Illinois, 378 U.S. 478, 490 n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during

incommunicado interrogation, the burden is rightly on its shoulders.

[52-54] An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could consititute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S 506, 516, 82 S.Ct 884, 890, 8 L.Ed.2d 70 (1962) is applicable here:

> "Presuming waiver from a silent record is permissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

> See also Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. (Footnotes omitted, 384 U.S. at 473-476, 86 S.Ct. at 1627-1628)

As the Court later pointed out, Miranda clearly provided that when a suspect assets his right either to remain silent or to talk to an attorney before being questioned, "the interrogation must cease," but "it (did not state under what circumstances, if any, a presumption of questioning is

permitted." In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) the Court held that a statement about a homicide made to another detective, more than two hours after the defendant had declined to discuss robberies with which he was accused, could be admitted against him. "The admission in evidence of respondent's incriminating statement did not violate Miranda principles. Respondent's right to cut off questioning was scrupulously honored, the police having immediately ceased the robbery interrogation after respondent's refusal to answer and having commenced inquiry about the

murder only after a fresh set of warnings had been given respondent."

In the instant case the interrogating officer "scrupulously honored" the appellant's right to silence by immediately stopping questioning when he asked to talk to an attorney, and satisfied the "heavy burden" of demonstrating he had changed his mind when officers after a substantial interval again spoke to him.

It is hard to imagine a more careful waiver than that made by appellant to Sergeant Ward the day after his arrest. First orally appellant received his warnings, the Sergeant carefully

stressing that, if appellant wished an attorney present, the interview would immediately terminate. Then followed a written waiver, with appellant reading out loud each of the four Miranda warnings and initialing each in turn to deomonstrate he understood its impact. The statement was written by Ward at appellant's request and each of the three pages signed by appellant after checking it for accuracy.

Two experienced District Court Judges, the Honorable Harold W. Schultz and the Honorable Sidney P. Abramson, reviewed the record in light of the relevant cases, and found that appellant

understood the decision he was making when he talked to Sergeant Ward and that he had simoly changed his mind. Judge Schultz was particulary impressed by the absence of any hint of coercion in the atmosphere when Ward went to appellant. "I didn't get the impression that Officer Ward indicated any desire on his part to try to change anybody's mind. I thought it was a recognition very obviously of the fact that very often people do change their minds." (T.R. 68, 11. 4-8)

At no time did appellant refer to a particular attorney he had engaged or used and at all the relevant times of interrogation here he had not been charged with

any crime, and thus no attorney had been appointed to represent him. Under such circumstances, his right to assistance of counsel under the Sixth and Fourteenth Amendments had not attached and thus could not be violated. Massaih v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

The United States Supreme Court's recent decision in Edwards v. Arizona, ___ U.S. ___, 101 S.Ct. 1880 (1981) is distinguishable from the instant case for a number of reasons. There, the Arizona Supreme Court

had wholly misconceived the issue by holding that the issue was the voluntariness of the defendant's ultimate confession, and not his waiver of the right to an attorney's presence, which he had previously asserted. Also, the State had clearly failed to satisfy its heavy burden of proving the defendant's change of mind was voluntary, because prior to requestioning, the guard told defendant "he had" to talk and then took him to meet with the detective. (101 S.Ct. at 1882, 1884)

The concurring opinion of Mr. Justice Powell, (101 S.Ct. at 1887 f.f.) moreover, stresses that the majority opinion of Mr.

Justice White should not be read to create a new per se rule that one who has once asked to see a lawyer can waive his right to an attorney's presence only where he had initiated the dialogue. As Justice Powell rightly points out, such a rule would fly in the fact of a long and unbroken line of precedents, starting with Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), that "waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances

surrounding that case, including the background, experience and conduct of the accused.'"

All factors should be considered and weighed and none should be decisive so long as the critical question of voluntariness be decided equitably. Such a rule has been applied to the waiver of a juvenile, Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). Also, an implied oral waiver may be proved, relying on all the attendant circumstances, even where the defendant refuses to execute a written waiver. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286

(1978). "The questions is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case." (441 U.S. at 373, 60 L.Ed.2d at 292).

Indeed, the majority opinion in Edwards was written by Mr. Justice White, whose own concurring opinion in Michigan v.Mosley, (423 U.S. at 107, 96 S.Ct. at 328) expressed fear lest just such a per se approach be inferred from the Court's Mosely opinion that "some custodial confessions will be suppressed even though they follow an informed and voluntary waiver of the defendant's rights ... (if

obtained) within some unspecified time after an assertion by an individual of his 'right to silence"..." Justice White concluded:

> "... I am no more convinced that Miranda was required by the United States Constituion than I was when it was decided. However, there is at least some support in the law both before and after Miranda for the proposition that some rights will never be deemed waived unless the defendant is first expressly advised of their existence. E.G. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 238 (1969); Fed. Rules Crim. Porc. 11, 32(a)(2). There is little support in the law or in common sense for the proposition that an informed waiver of a right may be ineffective even where voluntarily made. Indeed, the law is exactly to the contrary, e.g.

Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 86 L.Ed.2d 235 (1973); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Parker v. North Carolina, 397 U.S 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). Unless an individual is incompetent, we have in the past rejected any parternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case. Faretta v. California, 442 U.S 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). To do so would be to "imprison a man in his privileges," Adams v. United States ex rel. McCann, 317 U.S. 269, 280, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942), and to disregard "'that respect for the individual which is the lifeblood of the law,'" Faretta v California, supra, 442 U.S. at 834, 95 S.Ct. at 2541. I am very reluctant to conclude that Miranda stands for such a proposition (423 U.S. at 108-109, 96 S.Ct. at

328-329, Footnote omitted)"

On applying Edwards to the facts of this case, one of two things must be true. On the one hand, "if the Court's opinion can be read as not departing from established doctrine," as Justice Powell hoped, the State has demonstrated a voluntary waiver based on the totality of the circumstances, even though defendant did not "initiate" the interview. On the other hand if Edwards is construed to impose a per se rule of admissibility, a radical departure from prior law, it should not, under generally accepted rules of constitutional interpretation, be applied retroactively.

Both Sergeant Ward's questioning and the decisions below of Judges Schultz and Abramson took place before Edwards was decided. The Judges' decisions were clearly correct in light of the law and authorities then on the books.

To determine whether a newly announced constitutional rule should be applied retroactively one looks to "the purpose of the rule (our new standards governing police interrogation), the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application..." Most important, under this test

Miranda itself, and its precursor Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964 were held, as prophylactic rules governing police conduct, to be applicable only prospectively. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), decided the same day as Miranda. Accord, Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) declining to apply retroactively Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) Contra Gideon v. Wainwright, 372 U.S 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) the right to counsel at trial of an indigent held to

affect the very integrity of the fact-finding process" and to avert "the clear danger of convicting the innocent."

Here, it is essentially unfair to apply novel standards of voluntariness of a Miranda waiver, where the waiver would have been clearly held valid, but for the application of a later decided per se rule of exclusion.

The circumstances under which this waiver were made belied any question of influence or coercion. The afternoon before - a full fifteen hours earlier - appellant had indicated his desires to talk to an attorney before talking about either the theft or the criminal sexual

conduct charges which were later to be lodged against him. In the evening, he relented and talked to Sergeant Pelton about the thefts, affirmatively suggesting a search of his duplex so police could verify no more contraband was there.

Sergeant Ward, next morning, didn't realize appellant had previously mentioned an attorney; he must have known appellant had talked openly to Pelton the previous evening.

While it couldn't be said that appellant "initiated" the discussion about the criminal sexual conduct charges, once broached, he asked twice that the complaint of Jennifer Krier and

her mother be read to him and blurted out that he was guilty. Given these facts, appellant's confession was actually made neither in response to custodial interrogation, nor to its functional equivalent. Rather it was his emotional response to the complaint of the Kriers read to him by the Sergeant at his own request. As Sergeant Ward stated: "Yes, he told me that he felt very bad for doing this. He felt like an animal, and that's why he was telling me this, that he needed help." (T. R. 36, 11, 13-15), emphasis added) The statement was made in response to internal not external pressures.

Under like circumstances, the

CONCLUSION

The United States Supreme Court in Miranda did not mean to remove from law enforcement officals the tool of interrogation to elicit incriminating statements. Rather it purposed to deter the use of coercive techniques against isolated suspects who, without access to counsel to assist them, might be deceived into thinking cooperation was the only course of conduct open to them.

One should understand the special problems faced by law enforcement officials attempting to establish responsibility for silent unwitnessed crimes against victims too young to testify

against their predators but traumatized in a way potentially to effect their entire lives; crimes that if unpunished - and the perpetrator untreated - are highly likely to be repeated on the persons of other equally defenseless and equally mute victims.

That law enforcement may be hard can't justify violation of any person's fundamental rights. Here, to the contrary, as both judges in the District Court recognized, the State simply urges this Court to approve asking an accused if he has changed his mind and will be interviewed - while making equally clear to him that no

untoward result will attend his continuing refusal.

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Dated: June 22, 1982

APPENDIX

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

State of Minnesota

ORDER

v.

File No. 33232-33 John Henry Brown,

Defendant.

The mattter arises on a remand from the Minnesota Supreme Court for reconsideration of Appellant's motion for a new trial, based upon the decision of the United States Supreme Court in Edwards v. Arizona, 101 S.C. 1880 (1981). That case was decided subsequent to this

Court's denial of the Appellant's motion after conviction for Criminal Sexual Conduct in the First and Second Degree.

Appellant appeared personally and with counsel, Assistant Public Defender, Keith Hanzel, Esq. The State was represented by Steven DeCoster, Esq., Assistant Ramsey County Attorney.

Upon reconsideration,

IT IS ORDERED that Appellant's motion for a new trial is granted and the matter is placed upon the calendar of this court for trial on April 5, 1982.

SIDNEY P. ABRAMSON
Judge of District Court

Dated: January 25, 1982

MEMORANDUM

The facts briefly summarized are that St. Paul police officers were advised by the parents of three and a half year old Jennefer Krier that Appellant had sexually assaulted her within the definition of Criminal Sexual Conduct in the First and Second Degree. Additionally the parents advised police that Appellant would be returning to their home with property stolen from his employer, St. Paul Ramsey Hospital. Based upon appropriate cause, the officers arrrested Appellant in mid afternoon of March 27, 1980, and immediately advised him of his rights under Miranda v. Arizona, 384 U.S. 436

(1966). Appellant after such warnings, declined comment and stated "I don't want to say anything until I see a lawyer." (Ras. T. P. 8. Trial T. P. 53) Further, conversation while in the squad car led to additional refusals by Appellant and his reiteration of his desire to obtain counsel. (Ras. T. P. 18, Trial T. P. 46-47)

Later that same evening, Sgt. Joseph Pelton approached Appellant in jail, readvised him of his Miranda rights, and after assuring himself that Appellant understood, proceeded to question him regarding the theft charge. Appellant, making no reference to counsel, agreed to answer

questions relative to the theft and even signed a Waiver and Consent to search his home. (Ras. T. P. 24-5)

The following morning, March 28, 1980, Officer Ward interviewed defendant in jail, warned him again, and had him execute a Waiver of Rights Form. (Ras. T. p. 32-33, Trial T. P. 60) Again, Ward pursued the theft charge, but then shifted his focus to the sexual conduct. Appellant requested the officer to read the charges against him by the child's mother and when this was done, apparently began to cry, asked for the charges to be read again, broke down and admitted the criminal sexual

conduct. (Ras. T. P. 35-36, Trial T. P. 61) The officer wrote out a statement which Appellant signed. (Ras. T. P. 37, Trial T. P. 62)

Charges resulted, and in May, a Rasmussen Hearing was held before the Hon. Harold Schultz, Appellant moving to suppress his statement on grounds that the police, while continuing to question him after his refusal to talk, violated his Fifth and Fourteenth Amendment rights. The motion was denied by Judge Schultz. Subsequent to his order, the defense moved for an examination pursuant to Rule 20, MRCP, and in August, 1980 was found competent. At that time

the Hon. J. Jerome Plunkett reviewed Judge Schultz' order and found it valid, referring it back to Schultz for trial. The matter subsequently was assigned to the undersigned due to scheduling conflicts, and this Court reviewed the matter and independently found Appellant's statement to have been voluntary. (T. P. 26)

This Court distinguished the cases which had been relied on by Appellant, as in each of those cases, counsel had already been assigned and notwithstanding that, interrogation had gone on. State v. Crisler, 285 N.W.2d 679 (1979); State v. Giddings, 200 N.W.2d 595 (1980); State v.

Sufka, 295 N.W.2d 665 (1980). Noteworthy is that even with the factual situations presented in those cases, the Minnesota Supreme Court refused to adopt a "per se rule" which prohibited discussion with a represented defendant. State v. Giddings, supra, at Footnote 3. Those cases convinced this Court that the appropriate law was, as before, that given a finding of voluntariness in any waiver, as statement could be offered, and, so conviced, decided the issue adversely to the Appellant. In May, 1981, six months after sentence, the United States Supreme Court decided Edwards v. Arizona, supra. Edwards had been

arrested for robbery, burglary and first degree murder. He was warned in accordance with Miranda, he asked for counsel, and questioning was discontinued for a day. When officers returned, even though he voiced a desire not to talk with anyone, a guard told him "'he had to talk' and then took him to meet with the detectives." Edwards, after being informed of his rights, asked to have his accomplice's taped statement played for him and, listening for awhile, offered his own incriminating statement. His motion to suppress at trial was denied and his statements were used to aid in his conviction. On appeal,

the Arizona Supreme Court affirmed the conviction holding that Edwards had waived his right to counsel voluntarily. The United States Supreme Court reversed, six justices for the majority with the balance concurring. The six justices state a clear prophylactic rule:

> ... We now hold that when an accused has involved his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused such as Edwards, having expressed his desire to deal with the police only thru counsel, is not subject to further interrogation by the authorities until counsel has been made available to

> him, unless the accused himself initiates further communication, exchanges or conversation with the police ... We ... emphasis that it is inconsistent with Miranda and its progeny for the authorities at their instance, to re-interrogate an accused in custody if he has clearly asserted his right to counsel..." (49 L.W. 4498).

The only procedure which could countermand this direction, concluded the Supreme Court, would be the defendant's initiation of the police contact. They note, reminiscent of the facts in the case at issue, "... He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement ... We think it clear

that Edwards was subject to custodial interrogation ... at the instance of the authorities. His statement made without having access to counsel did not amount to a valid waiver and hence was inadmissible ..."

Chief Justice Burger in his concurring opinion cautions against "Good things ... carried too far" in reference to the expansion of protections of in-custody defendants, but concludes that the Johnson v. Zerbst test (304 U.S. 458-464 (1938) still being viable, the guard's statement "that he had to" talk to the detectives was adequate mandating a decision for Edwards. (49 L.W. 4499)

Likewise, Justices Powell and Rehnquist concur but argue that the old "voluntary test" by the majority court action now had superimposed on it a requirement of proof regarding the initiating of the conversation, that is, the accused or authorities. They concluded that the "totality of the circumstances" in Edwards show an involuntary character to his statement, but they wrote: "...nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision (not to talk)." (49 L.W. 4499) They recognized further that is is not unusual for a suspect to welcome an

opportunity to talk even after first rejecting the idea.

Viewed then, in the context of the case at bar, Edwards makes this case a close one. Here defendant twice demanded counsel, but subsequently impliedly by not raising the issue, agreed later in the evening to talk without counsel, and did talk concerning a theft. The next day he again discussed the theft with Officer Ward but in the flow of conversation, as Ward raised the sexual conduct, asked to have the complaining witness's statement. This led him to break down, eventually asking for help for his sexual problems, he confessed.

It appears to this Court that either the prophylactic view of the six majority members of the Edwards court, or the view of any of the concurring justices in Edwards requires that Appellant Brown here was subject to impermissible pressure. Judge Schultz described it best in his original order. "Now, it's a little vague as to exactly how they slid into the matters of the criminal sexual conduct ... Nevertheless, slide into it they did ..." (Ras. T.P. 69). It is this "sliding in" that the majority of the court in Edwards prohibited in May of 1981. and so regrettably this Court can do no more than hold Appellant entitled

trial. I do this notwithstanding the State's strong argument regarding the retroactive character of such a decision. In other words, it is, in their view, a "newly announced" constitutional doctrine departing from established law. The very language of Edwards would refute the State's assertion: "... In Fare v. Michael C., 442 U.S. 707 (1979) the Court referred to Miranda's "rigid rule" that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights requiring that all interrogation ceases, and just last term ... the Court again referred to the "undisputed right" under Miranda to remain

silent and to be free of interrogation until he had consulted with a lawyer. Rhode Island v. Innis, 446 U.S. 291. We reconfirm these views .. and to lend them substance, emphasize that it is inconsistent with Miranda ... to reinterview an accused in custody if he has clearly asserted his right to counsel." 49 L.W. 4498) (Emphasis supplied).

Accordingly, on reconsideration mandated by the Minnesota Supreme Court, Appellant's motion for a new trial is granted.

SPA.

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